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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1350

WESLEY J. LEONARD,
Petitioner,

v.

EXXON CORPORATION and/or
NICHOLS CONSTRUCTION CORPORATION, and
FIREMAN'S FUND INSURANCE COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD A. CHOPIN
JOHN W. TAVORMINA
Post Office Box 60626
210 O'Keefe Ave., Suite 602
New Orleans, LA 70160
Counsel for Exxon Corp.

OF COUNSEL:

BERNARD J. CAILLOUET

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Respondent, Exxon Corporation, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 581 F. 2d 522.

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QUESTIONS PRESENTED

I. WHETHER CONSTRUCTION BARGE CP-12 WAS A "VESSEL" FOR MARITIME JURISDICTIONAL PURPOSES?

II. WHETHER PLAINTIFF WAS ENTITLED TO A TRIAL BY JURY?

III. WHETHER THE SUPREME COURT OF THE UNITED STATES SHOULD REVIEW CONCURRENT FINDINGS OF FACTS BY THE DISTRICT COURT AND THE COURT OF APPEALS?

STATEMENT OF THE CASE

This is an action for personal injuries allegedly sustained by Wesley J. Leonard, an employee of Nichols Construction Corporation [Nichols] on August 26, 1974. The accident allegedly occurred at a construction project site on the edge of the Mississippi River near the Exxon refinery in Baton Rouge, Louisiana. Plaintiff brought suit against Nichols for negligence under the Jones Act and unseaworthiness under the General Maritime law and against Exxon Corporation [Exxon] for negligence under the General Maritime law.

Nichols was under contract with Exxon to build a pipeline assembly and Leonard was the foreman of one of the Nichols' crews. The work was being performed on four barges that were strung together and moored to the shore adjacent

to the Mississippi River. Three barges were moored together end to end and a fourth barge with a crane was moored between the three construction barges and the shore. A more or less permanent access ramp made of dirt and mats ran from the edge of the shore to the crane barge. Plaintiff alleged that Exxon moored fuel barges in the work area with two lines running to the construction barges and he was in the process of untying these lines when his alleged accident occurred.

Nichols and Fireman's Fund Insurance Company moved for summary judgment based on the grounds that the barge on which the plaintiff was allegedly injured was not a vessel. Nichols demonstrated the manner in which the construction barges were moored together and to the river bank. Nichols also showed the existence of the ramp to

and from the construction barges and established that the purpose and function of these barges was not navigation. In addition, Nichols proved that the barges were not designed for the transportation of passengers, cargo or equipment from place to place across the navigable water. The trial court granted the motion dismissing the Jones Act claim and gave its reasons in the Minute Entry of March 31, 1976.

Exxon filed a motion to strike plaintiff's request for trial by jury on the grounds that plaintiff's remaining claims were based upon general maritime negligence which does not provide a right to a jury trial. This motion was granted on June 7, 1976.

The matter proceeded to trial on June 14 and 15, 1976. The Court found no negligence on the part of Exxon, or

any other party, and dismissed the matter at plaintiff's cost. The Court found that the accident occurred when Leonard bent over to cast off a line. The medical evidence established that the plaintiff had two prior back operations and was more susceptible to injury than a person with a stable back. In its findings of fact and conclusions of law, the District Court stated:

> "I fail to see the evidence in this case that could in any way be considered to constitute negligence on the part of anyone which could be considered a proximate cause or a cause in fact, or any other kind of cause of this accident."

On appeal, the Fifth Circuit Court of Appeals affirmed the trial court's denial of vessel status as well as the Court's holding that plaintiff was not entitled to a trial by jury. The Fifth Circuit also found that the negligence issue and other contested

matters on appeal were not worthy of consideration. In addition, the Court of Appeals denied plaintiff's request for a rehearing of this matter.

Finally, the plaintiff filed this Petition for Writ of Certiorari in which he requests this Honorable Court to review the District Court's factual findings regarding the negligence issue. In addition, he asks the Court to review the consistent legal conclusions reached by the District Court and the Fifth Circuit concerning the issues of vessel status and the right to a trial by jury.

REASONS FOR DENYING THE WRIT

I. THE CONSTRUCTION BARGE CP-12 WAS NOT A "VESSEL" FOR MARITIME JURISDICTIONAL PURPOSES

It is axiomatic that a floating dry dock does not constitute a vessel for maritime jurisdictional purposes. Cope v. Vallet Dry-Dock Company, 119 U.S. 625, 7 S. Ct. 336 (1887); Atkins v. Greenville Shipping Corporation, 411 F.2d 279 (5th Cir. 1969), cert. den'd. 396 U.S. 846, 90 S. Ct. 105 (1969).

In Cook v. Belden Concrete Products, Inc., 472 F.2d 999 (5th Cir. 1973), cert. den'd. 414 U.S. 868, 94 S. Ct. 175 (1973), this rule was extended to a construction platform which was "legally indistinguishable" from a floating dry dock. The structure involved in Cook functioned primarily as a stationary construction platform which was secured to the dock

by ropes during the construction process. It was a flat deck barge with no motor power of its own and could be transported only by the use of tugboats or land-based cranes. The platform would occasionally be moved to different positions along side of the defendant's dock in order to pick up materials. In addition, the structure would periodically be towed a short distance for launching purposes upon completion of the construction work. The Fifth Circuit considered these factors and held that the structure was "legally indistinguishable" from a floating dry dock and therefore not a "vessel" for maritime jurisdictional purposes. Cook at 1000.

In Leonard v. Exxon Corporation, 581 F.2d 522 (5th Cir. 1978), the Fifth Circuit specifically stated that no material difference existed between the structures involved in Cook and the case

at hand. The Leonard Court described the structure before it as a platform consisting of four flat-deck barges which were not self-propelled and could be moved only by the application of some external source of power. Three of these barges were lashed together and moored to the shore by separate steel cables. The fourth barge was located between the shore and the other three barges and was connected to shore by a wooden ramp. This barge served as a crane platform and as an access ramp to the remaining barges. Leonard at 524.

After describing the structure upon which Mr. Leonard was allegedly injured, the Fifth Circuit stated:

> "This court has previously held that a similar floating construction platform which was neither designed for navigation nor engaged in navigation at the time of the accident, was, as a matter of law, not a vessel under the Jones Act. Cook v. Belden Concrete

> Products, Inc., 472 F.2d 999 (5th Cir. 1973). In Cook, as in the instant case, the barges were afloat, but that fact alone was not determinative of status. See also Blanchard v. Engine and Gas Compressor Services, Inc., 575 F.2d 1140 (5th Cir. 1978). Because appellant's proffered distinctions between Cook and the instant case are unpersuasive, and because we can find no material difference between the two cases, we are compelled to uphold the determination below that Leonard was not injured on a vessel." Leonard at 524. (Emphases added.)

Inasmuch as the Fifth Circuit has succinctly analyzed the controlling jurisprudential precedent, Exxon Corporation defers to the wisdom of that Honorable Court and submits that construction barge CP-12 was not a "vessel" for maritime jurisdictional purposes.

II. PLAINTIFF WAS NOT ENTITLED TO A TRIAL BY JURY

Once the plaintiff's Jones Act claim failed, the only remaining jurisdictional basis contained in his complaint

was maritime negligence. Plaintiff does not contest the well settled principle that such general maritime claims do not warrant a trial by jury. Romero v. Bethlehem Steel Corporation, 515 F.2d 1249 (5th Cir. 1975); Watz v. Zapata Offshore Company, 431 F.2d 100 (5th Cir. 1970). Rather, the plaintiff asserts that he was entitled to a jury trial because his claim was based on diversity of citizenship.

It is a long standing precedent that a plaintiff's citizenship must be diverse to the citizenship of each defendant in order to invoke the diversity jurisdiction of a federal court. Strawbridge v. Curtiss, 3 Cranch 267, 2 L.ED. 435 (1806). As the Fifth Circuit pointed out in the case at bar, complete diversity did not exist because the plaintiff, Mr. Leonard and defendant, Nichols Construction Company were both citizens of Louisiana.

Leonard, supra, at 524. Consequently, the plaintiff was not entitled to a jury trial and the District Court properly proceeded in admiralty.

It must be noted that the plaintiff never pled diversity as a possible jurisdictional basis. Instead, he relied on a pretrial order and a "brief colloquy" at trial to serve as notice to the Court and defendants that he was abandoning his admiralty claims and proceeding solely in diversity. Leonard at 524. A similar situation existed in Romero, supra, where the court stated:

> "The mere addition of diversity as a jurisdictional ground in the pretrial order - especially when no attempt was made to delete the sentence stating that '[t]he basis for jurisdiction is the admiralty and maritime jurisdiction' - is thus utterly insufficient to notify the court or the opposing party of the purported decision to amend the complaint." (Citations omitted.) Romero at 1252. (Emphasis added.)

The Fifth Circuit went on to state:

> "The effect of appellant's inaction, however, was to leave the jury issue in doubt right up to the day of trial. In these circumstances the trial judge would have correctly exercised his discretion in refusing to empanel a jury. Therefore, whatever appellant's theory, this case was properly tried without a jury." Romero at 1254. (Emphasis added.)

In light of the foregoing, it is clear that the plaintiff was not entitled to a trial by jury. When the plaintiff's Jones Act claim failed, the only remaining jurisdictional basis contained in the complaint was general maritime law. The plaintiff did not attempt to amend his complaint to include diversity jurisdiction and even if he had, it is clear and uncontradicted that complete diversity of citizenship did not exist and the plaintiff was therefore not entitled to a jury trial.

III. THE SUPREME COURT OF THE UNITED STATES SHOULD NOT REVIEW CONCURRENT FINDINGS OF FACT BY THE DISTRICT COURT AND THE COURT OF APPEALS

It is a settled rule of this Honorable Court that it will not review concurrent findings of fact by two courts "in the absence of a very obvious and exceptional showing of error." United States v. Lovasco, 431 U.S. 789, 799, 97 S. Ct. 2044, 2053 (1977); Berenyi v. Immigration Director, 385 U.S. 635, 87 S. Ct. 666, 670. Both the District Court and the Fifth Circuit fully considered and correctly decided the factual issues at hand. In fact, the Fifth Circuit found plaintiff's argument regarding erroneous factual findings of the lower court to be "without merit" and declined to discuss the issue. Leonard at 524.

Since the plaintiff has not illus-

trated a "very obvious and exceptional showing of error," the factual determinations of the District Court, which were affirmed by the Fifth Circuit, need not be reviewed by this Honorable Court.

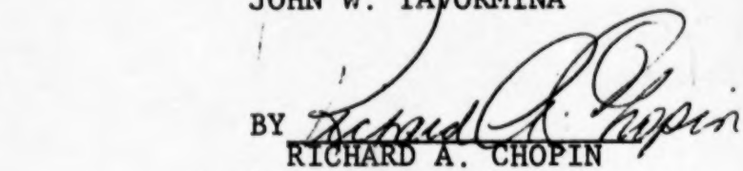
CONCLUSION

It is respectfully submitted that the courts below fully considered and correctly decided all relevant legal and factual issues. The Fifth Circuit in Leonard relied on established legal precedent and its holding is consistent with the decisions of other circuits dealing with similar matters. Consequently, there are no pressing issues which warrant

review by this Honorable Court and plaintiff's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD A. CHOPIN
JOHN W. TAVORMINA

BY 
RICHARD A. CHOPIN
Attorneys for Exxon Corporation
Post Office Box 60626
210 O'Keefe Avenue - Suite 602
New Orleans, LA. 70160
Telephone: 504-561-3286

OF COUNSEL:

BERNARD J. CAILLOUET

CERTIFICATE

I hereby certify that three copies of the foregoing have been mailed this date, postage prepaid to all counsel of record: Donald G. Cave, 7465 Exchange Place, Baton Rouge, Louisiana 70806; Boris F. Navratil, P. O. Box 3197, Baton Rouge, Louisiana 70821; and James C. Dixon, P. O. Box 15782, Baton Rouge, Louisiana 70815.

New Orleans, Louisiana, this 28 day of March, 1979.

Richard A. Chopin

RICHARD A. CHOPIN